THE HONORABLE MARSHA PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability Company, Plaintiff, v. EFINANCIAL, LLC, a Washington Limited Liability Company, f/k/a PRIMEPLAN, LLC, a Washington Limited Liability Company, also d/b/a TERMFINDER.COM, POLICYMATCH.COM; MICHAEL and KATHLEEN ROWELL, and their marital community; and JOHN DOES I-X, Defendants.	NO. CV 06-1118 MJP DECLARATION OF LARRY G. JOHNSON IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF

I, Larry G. Johnson, declare as follows:

1. I am over the age of 18 and competent to testify as a witness in this matter. I make the following declaration based on personal knowledge, and on belief and expertise developed over many years as an expert in computer forensics and electronic discovery.

2. I am President of e-DataEvidence, a company providing full-services e-discovery consulting and file processing of computer-generated data for law firms and corporate counsel, with particular emphasis on e-mails, using best-practices protocols and analytics for distilling

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relevant digital evidence for use in litigation. Previously, from 2002 to January of 2006, I was the President of Legal Technology Group, Inc., a digital data and electronic discovery consulting firm with offices in Washington and Oregon, and I am a former (2000-2002) Director of Electronic Discovery Services for Fios, Inc., of Portland, Oregon, a company specializing in electronic discovery, digital data processing, computer forensics and analysis. Prior to that, from 1998 to 2000, I worked as a consultant and Case Manager for Computer Forensics, Inc., in Seattle, Washington.

3. I have used personal computers extensively since they were first commercially available in the early 1980s and have substantial experience in the use and analysis of the Microsoft Office suite of applications (Word, Excel, Access, Outlook and PowerPoint) and the Microsoft Windows operating system in its various versions. For the past 19 years, I have consulted lawyers regarding the use of computers in litigation, and I have also practiced law as a litigator, having been admitted to the Washington State Bar in 1974, of which I am a member in good standing.

4. For the past nine years I have specialized in the areas of electronic discovery and computer forensics. Over the course of a year, I was formally trained in computer forensics techniques and software by Computer Forensics, Inc. in Seattle, Washington, and I have been trained and certified by New Technologies, Inc. (NTI) of Gresham, Oregon, in the recovery and analysis of digital data and the use of computer forensics tools. I have served as the Chairman of the Technology and Law Section of the King County Bar Association (Seattle) and have written extensively on computers and digital data discovery issues in *The ABA Journal* and numerous other publications. I have also been a frequent speaker at CLE presentations throughout the United States, discussing the use of computers in discovery and litigation. I am co-author with

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Tom Howe of a three-volume reference work entitled *Electronic Discovery Technologies, Practical Tips and Tools*, to be published by Law Forum Press in Q3 of 2007. I am a graduate of the University of Minnesota (B.A. *summa cum laude*, J.D. *cum laude*) and Harvard University (M.A.).

5. I have read Omni Innovations, LLC's ("Omni") Motion for Partial Summary Judgment and the Declaration of James S. Gordon, Jr., offered in support of that motion. I have been retained by the law firm of Jackson & Wallace LLP to provide my analysis and expert opinions regarding that motion and declaration.

6. By way of background information, an "e-mail" is a message, usually consisting of text, sent via computer from one person to another at an e-mail address. A "domain" in the context of e-mails is the name that appears to the right of the @ sign in an Internet address. Thus, for example, "james@gordonworks.com" is an e-mail address, whereas "gordonworks.com" is the domain that hosts that e-mail account and others. A domain is not the "destination" of a sent e-mail, but simply a repository of destinations, i.e. e-mail accounts, from or to which e-mails are sent.

7. A review of publicly available records reveals that Omni is not the owner of at least eight of the 11 domains for which it seeks a permanent injunction. Specifically, only gordonworks.com and itdidnotendright.com are owned by Omni Innovations, LLC. Rcw19190020.com might be owned by Omni Innovations, LLC, because a similar name is shown for the owner. The remaining eight domains for which Omni seeks an injunction, however, are all owned not by Omni, but by individuals who appear likely to be friends or family members of James Gordon, none of whom is a plaintiff in this matter.

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8. Two domain names for which plaintiff seeks an injunction but which it does not own are ewaterdragon.com and anthonycentral.com. In support of Plaintiff's motion for partial summary judgment, Plaintiff offers only three alleged emails as "proof" of spam emails sent to it (Gordon Dec'l., Ex. B), but one is to an email account at ewaterdragon.com (jim@ewaterdragon.com)[1] and two are to anthonycentral.com (ant@anthonycentral.com and chuck@anthonycentral.com).

9. Further, there is no evidence at all offered by Plaintiff to substantiate Plaintiff's claim that any of the Defendants sent these alleged emails. On the other hand, the alleged email sent to jim@ewaterdragon.com says on its face that it is from Lifeinsurancerates@retailsalesrptoutletdirect.com, and the other two are from Mark@desdinmtgk.com. Plaintiff offers no proof at all why these sender addresses should not be taken at face value, or how these three alleged emails can be linked to any of the Defendants.

10. Based on the fact that Plaintiff has offered no substantive evidence whatsoever to demonstrate that the three emails offered as proof were not sent to a domain owned by it, or that any of the Defendants sent them, it is my opinion that there is no factual basis to support the contentions made in Plaintiff's brief or Mr. Gordon's declaration.

11. Plaintiff also does not offer any proof in support of its contentions that it has suffered adverse impact, and it is unclear whether the "damages" claimed by Mr. Gordon in his declaration are personal to him, a non-party, or the Plaintiff. At any rate, in the course of my work, I frequently purchase computer equipment and software, and I advise clients on their needs

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[1] This alleged email is obviously not an original document, either. Several "empty box" placeholders for graphics indicate that major portions of what might have been an original email message are missing.

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and choices in this regard as well. It is a part of what I consider my professional responsibility to keep abreast of computer technology trends, new products and market prices for computer equipment and software. I also maintain a server in my work and know what the costs are to keep a small business network functional.

12. Plaintiff's claims for damages are either trivial or self-inflicted. For example:

a. In Mr. Gordon's Declaration, page 3, Para. 7.1, he claims he needed to purchase a "second business computer to help with the increased load of spam." The price paid for this computer is not stated, nor is there any explanation why another computer would be needed. There are dozens of software and online solutions available to "kill" spam before it ever reaches the intended email addressee. Only a person who wants to go out of his way to harvest spam emails in order to make a living from suing alleged spammers would need additional hard drive storage space to keep them all, which is apparently what Mr. Gordon does full time.[2] At any rate, to amass a large volume of emails, at most all Mr. Gordon would need is a second hard drive for his computer. A quality hard drive storing 100 gigabytes of data (100 billion bytes, which would be sufficient to store the emails of thousands of email users for several years' worth of emails) can be purchased today for less than $160.

b. Further in Para. 7.1, page 3: "In May 2005, my monthly service fee increased…" etc. This sentence has no relationship to the one preceding it (i.e., purchase of second computer). It is

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[2] In the Order dismissing the Complaint in *James S. Gordon, Jr. et al. v. Virtudmuno, Inc. et al.*, Case No. 06-0204-JCC, Western District of Washington, dated May 15, 2007, Judge Coughenour noted that "All of Plaintiff's income or revenue for 2006 and 2007 has been from 'settlements and disputes'" of claims made by him against alleged spammers. Pages 7 and 8. The Order also reveals that "Plaintiffs operate a website at gordonworks.com, and they provided e-mail accounts to at least six clients 'free for the first year, subject to data collection' for Plaintiff Gordon's 'research purposes.' Page.6. Also, on page 8 of the Order: "Defendants suggest that Gordon's sorting effort is 'exclusively directed toward litigation preparation,' and consists of sorting batches of (already-identified) spam e-mails, sent to him by clients 'unsorted in lots of 10–50,000' for use in his multiple spam lawsuits."

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not clear whether this is a telephone company charge, Plaintiff's Internet Services Provider charges, or what. If there is some telephony- or Internet-related service that would increase its rates due to Plaintiff's need to "manage spam," I have no idea what that would be, and Plaintiff offers no supporting documents to support this claim or the nature of service involved.

c. Para. 7.2, page 3: $99/month for Godaddy "staff." Again, there are no supporting documents to substantiate this claim. Further, when one goes to the Godaddy web site at www.godaddy.com and uses its "Help Center Search" and "Web Search" engines, the site reveals that there is no such thing as an "Assisted Server Support" service or team. There is an "Assisted Service Plan" that offers various monitoring, backup and security features for subscribers with dedicated servers. It is unclear how this service relates to Plaintiff's business, or why it would be needed.

d. Para. 7.3, page 4: "It has been necessary to purchase numerous forensic tools, anti-virus tools, anti-spyware tools, and spam filtering tools over the last four years. I have spent approximately $2000.00 on these tools and services." This "expense" appears to be personal to Mr. Gordon, not Plaintiff. Without documentation and names of the software applications, there is no way to know what Mr. Gordon bought and whether the purchases were reasonable. There are many free anti-spam software applications, including a product called SpamAssassin. I have been retained by defendants in a case brought by this same Plaintiff against them, also set for a partial summary judgment motion for a permanent injunction before The Hon. Judge Zilly.[3] I have evaluated thousands of alleged emails in that case, and in thousands of them there was evidence left behind to indicate that Mr. Gordon had installed and used SpamAssassin as a spam filter on

[3] *Omni Innovations, LLC v. InsuranceOnly et al.*, No. CV06-1210TSZ. The motion and Mr. Gordon's declaration in that case are identical in text to those filed in this action.

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his server.[4] A quality suite of commercially available anti-spam and anti-virus software should cost no more than a total of $200 in an annual subscription package.

e. Para. 7.4, p. 4. "…displacement of over 25 Gigabytes…" No dollar amount is stated, or what the "impact" otherwise is. Technically, the term "displacement" makes no sense. Computer files do not "displace" other computer files on a hard drive. They may consume unallocated hard drive space, but that is what happens in the normal operation of computers. Computers are designed to not allow spam emails or any other computer-generated files to overwrite other ones unless the user deletes a file (or the computer is infected with a malicious virus that is capable of deleting files and is somehow activated). If properly configured, the "$2000" worth of Mr. Gordon's anti-virus and anti-spam software would have, in most cases and to high degree of probability, immediately eliminated unwanted emails or viruses and freed up the 25 GB of space, which, in any event, is a trivial amount of storage space on a hard drive. Hard drives can currently be purchased with 1,000 GB of storage space for less than $350 at Fry's in Renton that easily connect to a computer via a USB port. It is possible to "daisy chain" several such hard drives.

f. Para. 7.5, page 4: laptop "'overrun' with spam." Laptops do not get "overrun" by anything. See comments to subsections "a" and "e" immediately above.

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[4] Though SpamAssassin's purpose is to alert email box owners of possible spam emails, and it offers procedures to block further emails from the same source, Mr. Gordon has instead used the software to harvest and store emails that SpamAssassin identified in the InsuranceOnly case as either "not spam" or "possible spam."

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

SIGNED at Newcastle, Washington, on this 9th day of July, 2007.

LARRY G. JOHNSON

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2007 I electronically filed the foregoing document entitled Declaration Of Larry G. Johnson In Support Of Defendants' Opposition To Plaintiff's Motion For Partial Summary Judgment For Injunctive Relief in accordance with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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